AHMAD BASHID ABDUL MALEK & ORS *a*

v.

TIMBALAN MENTERI DALAM NEGERI, KEMENTERIAN DALAM NEGERI MALAYSIA & ORS & OTHER APPEALS *b*

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
ABU MANSOR ALI JCA *c*
[CRIMINAL APPEALS NOS: C-05-40-98, A-05-19-98 & A-05-20-98]
3 JUNE 1999

ADMINISTRATIVE LAW: *Remedies - Habeas corpus - Rehabilitation of drug dependants - Order of residence under s. 6(1)(a) of Drug Dependants (Treatment and Rehabilitation) Act 1983 - Application for writ of habeas corpus - Whether procedurally proper - Whether applicant must apply for writ of certiorari - Federal Constitution, art. 5 - Courts of Judicature Act 1964, Schedule para 1* *d*

CRIMINAL PROCEDURE: *Habeas Corpus - Rehabilitation of drug dependants - Order of residence under s. 6(1)(a) of Drug Dependants (Treatment and Rehabilitation) Act 1983 - Application of writ of habeas corpus - Allegation of procedural irregularity - Whether order of residence amenable to challenge by way of habeas corpus - Whether applicant must apply for writ of certiorari - Federal Constitution, art. 5 - Courts of Judicature Act 1964, Schedule para 1 - Criminal Procedure Code* *e* *f*

The appellants were held to be drug dependants and were ordered by the magistrates to be admitted to rehabilitation centres pursuant to s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). The appellants applied for writs of *habeas corpus* before the High Court. The learned judges held that the proper way was for the appellants to have proceeded by way of *certiorari* instead of *habeas corpus*. They therefore dismissed the applications. Hence these appeals. *g*

The issue for consideration was whether the appellants should have applied for *certiorari* instead of proceeding by way of *habeas corpus*. *h*

i

Held:

Per Siti Norma Yaakob JCA

[1] The appellants had chosen the speedier and less cumbersome remedy of *habeas corpus*, the alternative to *certiorari*. For that reason the High Court should have proceeded to hear their applications on merit and not be bothered with procedural technicalities. Under both the Federal Constitution and the Courts of Judicature Act 1964, the High Court has the jurisdiction and power to determine the legality or otherwise of the appellants' detentions by way of *habeas corpus*.

Per Abu Mansor Ali JCA

[1] The appellants had the right to make applications for *habeas corpus* as they alleged their detentions were illegal.

[2] Article 5 of the Federal Constitution confers on one who complains of the deprivation of his personal liberty not being in accordance with law and of his being unlawfully detained the right to make an application for a writ of *habeas corpus*.

[3] *Habeas corpus* therefore was available to all the appellants to challenge their detentions and it was incumbent on the learned judges to hear the appellants.

[Appeals allowed; applications remitted to High Court.]

Case(s) referred to:

Ang Gin Lee v. PP [1991] 2 CLJ 857 ***(foll)***
Mohd Shahriman Mohd Khairil v. PP & Anor [1998] 2 CLJ 855 ***(refd)***
Sazali Mat Noh v. Timbalan Menteri Dalam Negeri, Malaysia [1998] 4 CLJ 460 ***(foll)***
Wong Kon That & Ors v. Ketua Commandan Pusat Serenti Karangan, Kulim & Anor [1999] 1 CLJ 897 ***(refd)***
Yeap Hock Seng v. Minister for Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, Schedule para 1
Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 6(1)(a), 19(1)(b)
Federal Constitution, art. 5(1), (2)

Criminal Appeal No: C-05-40-98
For the appellants - Ahmad Nizam Hamid; M/s Sazali & Lim
For the respondents - Abdul Alim Abdullah SFC

Criminal Appeal No: A-05-19-98
For the appellant - R Palaniappan (M Athimulan with him); M/s Palani
For the respondents - Abdul Alim Abdullah SFC

Criminal Appeal No: A-05-20-98
For the appellant - M Athimulan (Naran Singh with him); M/s Naran Singh & Co
For the respondents - Abdul Alim Abdullah SFC

[Appeals from High Court Temerloh, CA No: 44-01-98; High Court Taiping, CA No: 44-7-98; High Court Kuala Kangsar, CA No: 44-8-98]

Reported by Mariette Peters-Goh

JUDGMENT

Shaik Daud Ismail JCA:

I have had the opportunity of reading the judgment of Siti Norma Yaakob JCA in draft and I concur with her judgment.

Siti Norma Yaakob JCA:

This appeal was argued as a test case as it involved an issue common to two other appeals, also fixed for hearing before us, namely Criminal Appeals Nos: A-05-19-98 and C-05-40-98, based on similar fact situations, although all three appeals involved different appellants and respondents and the decisions appealed against were made by different judges, two from the High Court at Taiping and the other at Temerloh. Additionally there has been conflicting decisions made over the same issue by the High Court sitting at different places. See the cases of *Mohd Shahriman Mohd Khairil v. PP & Anor* [1998] 2 CLJ 855 and *Wong Kon That & Ors v. Ketua Commandan Pusat Serenti Karangan, Kulim & Anor* [1999] 1 CLJ 897; [1998] 3 MLJ 380. The common issue raised is whether a writ of *habeas corpus* or an order of *certiorari* would lie to question the decision of a magistrate made pursuant to s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ("the Act").

The similar fact situations arose in the following manner. All the appellants in the three appeals were arrested by the police at various places as suspected drug dependants. This set in motion the machinery provided by Part 2 of the Act and the respective magistrates acting under s. 6(1)(a) of the Act held separate inquiries and ordered all the appellants to be detained for two years at various rehabilitation centres to undergo treatment and rehabilitation.

Dissatisfied with the magistrates' detention orders, all the appellants filed separate applications for writs of *habeas corpus* to be issued against the named respondents under Chapter XXXVI of the Criminal Procedure Code, to secure their immediate releases.

At the hearing of the respective applications, the respective respondents raised a common preliminary point that the appellants had adopted the wrong procedure to secure their releases by way of *habeas corpus*. The respondents contended that the appellants should have sought orders of *certiorari* instead to quash the magistrates' decisions ordering their detentions. The courts below upheld the preliminary objection, ruled that the appellants had adopted the wrong procedure and dismissed the appellants' applications without hearing their merits. It is against such orders that the three appeals are founded.

In the case of the instant appellant, two affidavits have been filed, one in support of the application for *habeas corpus* and the other in rebuttal. The supporting affidavit is made by the appellant's father who swore to the fact that the appellant was detained by the police on 16 September 1997 as a suspected drug dependant and produced before the magistrate at Sitiawan on 29 September 1997. After holding an inquiry, the magistrate ordered him to be detained for a period of two years at the Pusat Serenti, Sungai Petani, Kedah. In seeking his son's release, the appellant's father alleges that the detention order was illegally and unjustifiably made by the magistrate as she had failed to comply with the mandatory provisions of Part 2 of the Act. This has been strenuously denied in the affidavit in rebuttal sworn by the particular magistrate who made the detention order.

Before us, Mr. Athimulan, of Counsel for the appellant, argued that *habeas corpus* is the right remedy as it secures the immediate release of the appellant from unlawful detention. This is so as the procedure for obtaining it is less cumbersome. Unlike the order for *certiorari,* no leave is necessary before the application for *habeas corpus* can be heard on its merit. Moreover as the issue involves the personal liberty of the appellant, a fundamental right guaranteed by art. 5 of the Federal Constitution, the Court below should be less stringent in its approach and should not be unduly bothered by a procedural objection placed before it to defeat the appellant's right to be heard on his application for *habeas corpus*.

By way of rebuttal and in supporting the decision of the Court below, Encik Abdul Halim Abdullah, Senior Federal Counsel for the respondents contended that what is being challenged by the appellant is the process making decision of the magistrate and as such, *certiorari,* a judicial review remedy, would be a more appropriate remedy as it has the effect of quashing such an order and consequentially, the immediate release of the appellant. This is so as the magistrate's order is not appealable. See the case of *Ang Gin Lee v. Public Prosecutor* [1991] 1 MLJ 498. Furthermore as the purpose of *habeas corpus* is to prevent unlawful detention, such a remedy does not lie on the facts of this appeal as the appellant is in lawful custody by virtue of s. 19(1)(b) of the Act, which reads as follows:

19. Lawful custody

(1) A person shall be in lawful custody -

(a) ...

(b) while he is resident at a Rehabilitation Centre ... under this Act;

Clearly s. 19(1) is a definition section. It defines who shall be in lawful custody and sub-s. (b) includes those resident at a rehabilitation centre. But it cannot be taken in isolation as to give the exclusive meaning that residence, *per se*, in a rehabilitation centre, amounts to being in lawful custody without due regard to the other provisions of the law that allows such a detainee to question the legality or otherwise of his detention. The source of the power to do so can be found in para. 1 of the Schedule to the Courts of Judicature Act 1964, (Act 91), which gives additional powers to the High Court to issue, *inter alia*, writs of *habeas corpus* and orders of *certiorari* in cases where the fundamental liberties of a person are in jeopardy. Paragraph 1 is worded as follows:

1 Prerogative writs

Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, mandamus, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

The enforcement of the rights conferred by Part II of the Federal Constitution includes the enforcement of the right to personal liberty as seen from the provisions of art. 5(1) and (2) which read as follows:

5(1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

Clause 2 speaks, of "being unlawfully detained" the very complaint that the appellant seeks to be determined before the High Court and since the court's jurisdiction conferred by Act 91 specifies more than one remedy how that complaint can be proceeded with, this gives the detainee the option to choose which of the two remedies is suited to his needs. I consider that the two remedies are not mutually exclusive. In this instance the appellant chose the speedier and less cumbersome remedy of *habeas corpus*, the alternative to *certiorari*. For that reason the High Court should have proceeded to hear his

application on its merits and not be bothered with procedural technicalities to stand in its way as by statute and the supreme law of the land, the High Court has the necessary jurisdiction and power to determine the legality or otherwise of the appellant's detention by way of *habeas corpus.* On that finding this appeal was allowed, the application for *habeas corpus* was remitted to the High Court to be heard on its merits. That same order was also made in respect of Criminal Appeal No A-05-40-98. However for Criminal Appeal No A-05-19-98, the only order made was to allow the appeal as the appellant in that appeal had already been released.

Abu Mansor Ali JCA:

These appeals of Ahmad Bashid bin Abdul Malek dan 57 yang lain, Rayuan Jenayah No. 40 Tahun 1998 (hereinafter referred to as "Ahmad Bashid's appeal), that of Tang Ah Yam, Rayuan Jenayah No. 19 of 1998 (hereinafter referred to as "Tang Ah Yam's appeal) and that of Loi Hing Chai, Rayuan Jenayah No. 20 of 1998 (hereinafter referred to as Loi Hing Chai's appeal) came before us on 14 December 1998. As can be seen they raised substantially the same issues, we therefore heard them together. It is also proposed that one judgment be written in respect of all appeals. After hearing arguments over two days on 14 December 1998 and on 15 December 1998 we unanimously allowed the appeals. We held that the appellants were entitled to proceed in their applications by way of writ of *habeas corpus* and consequently we then ordered that the cases be remitted for hearing by the respective High Courts from where they emanated.

In each on these appeals the respective appellants became involved as follows. In Ahmad Bashid's appeal, he and 57 others were arrested by the police on 1 November 1997 after a police operation and they were detained at the Police Station, Temerloh, Pahang. The appellant and others were suspected of being drug dependents. After an enquiry on 25 November 1997 under s. 6(1) of the Drug Dependants (Treatment and Rehabilitation) Act 1983, the learned magistrate ordered that the appellants be detained for two years at the Jelebu Rehabilitation Centre.

Each of the appellants being dissatisfied filed application by way of writs of *habeas corpus* before the Temerloh High Court. The learned judge Temerloh agreed with the objection of the prosecution and he held that properly the appellants should have proceeded by way of *certiorari* instead of proceeding by way of *habeas corpus*. The learned judge then dismissed the appellants' application for *habeas corpus* before him. It was against the judge's order that they appealed to this court.

In the case of *Tang Ah Yam's* appeal the facts are similar except that he was arrested by the police in Bukit Mertajam on 10 September 1997 suspected of being a drug dependant. The learned magistrate Bukit Mertajam ordered him to be detained till 23 September 1997 at Police Station Kampung Selamat and on that date after enquiry the learned magistrate Bukit Mertajam ordered the appellant to be detained for two years at the Pusat Serenti Bukit Mertajam.

Appellant then filed a writ of *habeas corpus* before the High Court Taiping. On a similar objection by the respondents the learned judge Taiping dismissed the appellant's application for *habeas corpus* holding that the appellants should have filed a writ of *certiorari*. The appellants thus appeal to this court.

In the case of *Loi Hing Chai's* appeal, similarly he was detained by the police on 16 September 1997 for the like suspected offence of being a drug dependant and the learned magistrate Sitiawan, Perak on 29 September 1997 ordered the appellant be detained for two years at the Pusat Serenti Sungai Petani, Kedah under s. 6(1) of the Drug Dependants (Treatment and Rehabilitation) Act 1983.

In a similar way the appellant Loi applied by way of a writ of *habeas corpus* but the learned High Court judge, Taiping agreed with the prosecutor's objection and he held that properly the appellant should have applied by way of *certiorari* and not a writ of *habeas corpus* and he dismissed the appellant's application. In a similar way the appellant Loi appeal to this court.

As already stated it is clear, therefore, that there is only one issue before this court in all the three appeals. Should the appellants have filed a writ of *certiorari* or could they proceed by way of writs of *habeas corpus* to have the appellants freed?

Mr. Athimulan on behalf of the appellants, after giving us the facts of the above cases, referred us to the case of *Ang Gin Lee v. Public Prosecutor* [1991] 1 MLJ 498 where the Supreme Court had occasion to consider a similar case. I humbly quote, rather than paraphrase:

> In this case the applicant and three others had been ordered by a magistrate to undergo treatment and rehabilitation at a drug rehabilitation centre for a period of two years from the date of the order. The order was issued by the magistrate pursuant to s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). The applicant filed an appeal to the High Court against the order of the magistrate. The learned judge dismissed the application. The applicant thereupon applied to refer questions of law for the determination of the Supreme Court under s. 66(1) of the Courts of Judicature Act 1964. The questions were:

(1) Whether an order made by a learned magistrate under s. 6(1)(a) of the Act is an order which falls within the definition of 'order pronounced by any Magistrate's Court in a criminal case or matter' as described in s. 307(i) of the Criminal Procedure Code (FMS Cap 6) and therefore there is a right of appeal against such order as provided for under s. 307(i) of the Code.

(2) If the answer to question 1 above is in the negative, then does the High Court have power either under s. 35 of the Courts of Judicature Act 1964 or under its inherent jurisdiction to review the decision of the learned magistrate and make such orders as the High Court might have made as it may consider just for the disposal of the appeal.

Held, answering both questions in the negative:

(1) The legislative scheme of s. 6 of the Act viewed with the provisions of criminal jurisdiction and appeal in the Subordinate Courts Act 1948 and the Courts of Judicature Act 1964 show quite clearly that the order of the magistrate under s. 6 of the Act is not an order appealable to the High Court.

(2) The order made by a magistrate in this case is not an order pronounced by a magistrate's court in a criminal case or matter for the purpose of s. 307(i) of the Criminal Procedure Code.

(3) Section 31 of the Courts of Judicature Act 1964, confers on the High Court powers of revision in respect of criminal proceedings and matters in the subordinate courts in accordance with any law for the time being relating to criminal procedure; it is obvious that the answer to question 2 must also be in the negative.

(4) Section 35 of the Courts of Judicature Act 1964 confers general supervisory powers on the High Court over the subordinate courts. This provision is to be construed as no more than providing for jurisdictional basis. Read in the context of ss. 31, 32 and 33 of the Act it would seem that s. 35 is particularly aimed at providing supervision in criminal and civil proceedings at any stage of the trial in a subordinate court.

At p. 501 of that case the learned Chief Justice highlighted and elucidate as follows:

It is obvious from the language of these provisions that our answer to question 2 must also be in the negative.

We appreciate that the provision of s. 6 of the Act, is penal in character in the sense that a person can be ordered to reside in a rehabilitation centre for two years to undergo treatment probably against his will. At the same time we also appreciate that it is a provision designed for the rehabilitation of drug dependants. It is a social legislation of sort. But we must not forget however

that the same legislation confers summary powers on the magistrate and can seriously affect the freedom of an individual. It was perhaps realizing this aspect of the legislation that the learned judge in this case suggested that if the applicant was dissatisfied with the order of the magistrate he should look elsewhere for reliefs. In other words if any person is dissatisfied with the order of the magistrate under that provision of the law because of some irregularity he should have access to the High Court but not through the appeal process. This judgment merely lays down the law that according to existing provisions of the law there is no appeal to or revision by the High Court from the order of the magistrate under s. 6 of the Act.

Counsel contended that the *habeas corpus* is the correct procedure, and the process for the most effective means for securing the immediate release of anyone from any unlawful detention. He contended further art. 5(1) and 5(2) of the Federal Constitution guarantee a person's liberty from such detention. I respectfully quote those articles:

5. Liberty of the person.

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

I duly take note that when a complaint is made to the High Court that a person is unlawfully detained, the High Court or judge shall enquire. Mr. Athimulan stressed to us that the application by way of *habeas corpus* was made by the appellants on the ground that certain mandatory procedures in the Act were breached and not duly followed before the learned magistrate made the order of detention under s. 6 of the Act. He submitted that it cannot be denied that under art. 5(1) of the Federal Constitution if any provision of any law is not complied with then under art. 5(2) thereof the judge can never be satisfied that the detention is lawful and when such is the situation, clearly, he submitted, the person detained must, therefore, be released. From the reading of the art. 5(1) and art. 5(2) of the constitution the appellants' right to make the application has been guaranteed by the constitution. It is a denial of that right if his application is dismissed without there being granted a hearing. The appellant's counsel, in support of this contention, cited the case of *Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs, Malaysia & Ors.* [1975] 2 MLJ 279, where, after hearing the applicant's application for a *habeas corpus*, the court held:

(1) the grant of *habeas corpus* is as of right and not in the discretion of the court in the circumstances of a fundamental right guaranteed by the Constitution being involved and section 365 of the Criminal Procedure Code (F.M.S. Cap. 6) must now therefore be read in this light and as modified accordingly by the application of the provisions of article 162(6) of the Constitution;

(2) a person is entitled to seek a writ of *habeas corpus* as of right and is not obliged to rely on the less convenient remedy of appeal or any other alternative remedy provided by statute. The existence of an alternative remedy, however convenient, beneficial and effectual does not prevent the issue of a writ of *habeas corpus* and it is open to the court notwithstanding to examine the legality of the impugned detention;

(3) in this case, the applicant was not precluded from making this application at this stage notwithstanding his right to make and the pendency of such representations to an Advisory Board under the Ordinance.

Counsel submitted that since an application for a writ of *habeas corpus* is a right conferred, the appellants is not obliged to rely on other remedy of *certiorari* before he can obtain relief.

Up to this stage I was almost ready to conclude as I was already persuaded by the appellant's counsel's persuasive argument that the learned judge has no choice but to enquire and there is no way how their applications can be dismissed in limine. Although we were not bound, I was further persuaded and fortified in my conclusion by the cited case of *Sazali Mat Noh v. Timbalan Menteri Dalam Negeri, Malaysia* reported in [1998] 4 CLJ 460, where, in a similar case of applicant, being detained under s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 and being dissatisfied, he applied to the High Court by way of *habeas corpus* for his release, arguing that such detention was illegal, as the learned magistrate, in making the order, had not observed several of the mandatory procedures in s. 6 of the Act. In a similar way the respondent objected to the application and insisted that the procedure should be by way of *certiorari* to have the learned magistrate's decision reviewed and that decision could not be challenged by way of *habeas corpus*, His Lordship judge KC Vohrah held, *inter alia*:

[3] Section 6 of the Act entails some mandatory duties on the enquiry magistrate, and it behoves him not to act mechanically. He has to make enquiry in respect of each individual brought before him, and if any of the mandatory procedures in respect of the affected person is not adhered to, the order of detention made in respect of such person is defective.

[4] Although there is no right of appeal under the Criminal Procedure Code, it cannot mean that the person detained does not have a right of access to the High Court to redress any irregularity which adversely curtails his personal liberty. He certainly can have recourse to the remedy of *habeas corpus*. The applicant has the right to make application for *habeas corpus* if he alleges his detention was illegal as proper procedures were not followed by the officer ordering the detention.

[5] Article 5 of the Federal Constitution, in addition, confers on one who complains of the deprivation of his personal liberty not being in accordance with law and of his being unlawfully detained the right to make an application for a writ of *habeas corpus.*

On the above authorities, I concluded that the procedure of *habeas corpus* was available, to all the appellants to challenge their detentions and it was incumbent on the learned judge to hear the appellants. Since that was our decision, we unanimously allowed the three appeals and ordered the cases be remitted to the respective High Courts for hearing and there be proper determination of the legality of their detentions. The respondents, not satisfied, now appeal to the Federal Court.